



**Cour  
Pénale  
Internationale**  

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**International  
Criminal  
Court**

Le Bureau du Procureur  
The Office of the Prosecutor



## **Report on Preliminary Examination Activities 2012**

November 2012

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## A. INTRODUCTION

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of all situations that come to its attention based on statutory criteria and the information available.<sup>1</sup>
2. The preliminary examination of a situation may be initiated by: (a) a decision of the Prosecutor, taking into consideration information on crimes under the jurisdiction of the Court, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the United Nations (“UN”) Security Council; or (c) a declaration pursuant to article 12(3) of the Statute by a State which is not a Party to the Statute.
3. Once a situation is thus identified, article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
4. *Jurisdiction* relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) either territorial or personal jurisdiction, which entails that the crime was or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or that it arises in a situation referred by the Security Council; and (iii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression<sup>2</sup>).
5. *Admissibility* comprises both complementarity and gravity.
6. *Complementarity* involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking into consideration the Office’s policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where

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<sup>1</sup> See the Draft Policy Paper on Preliminary Examinations of 4 October 2010.

<sup>2</sup> With respect to which the Court can exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force. RC/Res.6 (28 June 2010).

relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation.
8. The “*interests of justice*” is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
9. There are no other statutory criteria. Factors such as geographical or regional balance are not relevant criteria for a determination that a situation warrants investigation under the Statute. While lack of universal ratification means that crimes in situations outside the territorial and personal jurisdiction of the ICC may ordinarily be beyond the reach of the Court, it may exercise jurisdiction in those instances pursuant to a UN Security Council referral.
10. As required by the Statute, the Office’s preliminary examination activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information received pursuant to article 15. In all circumstances, the Office will analyse the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources. The Office may also receive oral testimony at the seat of the Court.
11. Before deciding whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide information they consider appropriate.
12. The Statute provides no timelines for a decision on a preliminary examination. Depending on the facts and circumstances of each situation, the Office may decide to (i) decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c); (ii) continue to assess relevant national proceedings; (iii) continue to collect information in order to establish a sufficient factual and legal basis to render a determination; or (iv) initiate the investigation, subject to judicial review as appropriate.
13. In order to promote transparency in the preliminary examination process the Office aims to issue regular reports on its activities and provide reasoned responses for its decisions to either proceed or not proceed with investigations.
14. When the Prosecutor has initiated the preliminary examination process *proprio motu* and determined a reasonable basis to proceed, the Office will invite the State(s) concerned to refer the situation to the Court in order to promote

cooperation. As in all other situations, such a referral will have no impact on investigative and prosecutorial activities.

15. The Office will also consider, as a matter of policy, the extent to which its preliminary examination activities can stimulate genuine national proceedings against those who appear to bear the greatest responsibility for the most serious crimes. In accordance with its positive approach to complementarity, based on the goals of the preamble and article 93(10) of the Statute, the Office will seek to encourage and cooperate with efforts to conduct genuine national proceedings.
16. In order to distinguish the situations that warrant investigation from those that do not, the Office has a filtering process comprising four consecutive phases:<sup>3</sup>
  - In phase 1, the Office conducts an initial assessment of all information on alleged crimes received under article 15 (“article 15 communications”), to filter out information on crimes that are outside the jurisdiction of the Court.
  - In phase 2, it analyzes all information on alleged crimes received or collected to determine whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject-matter jurisdiction of the Court.
  - In phase 3, it analyzes admissibility in terms of complementarity and gravity.
  - In phase 4, having concluded from its preliminary examination that the case is facially admissible, it will examine the interests of justice. A recommendation that an investigation would not serve the interests of justice will only be made in highly exceptional circumstances.

#### Summary of the activities performed in 2012

17. The Office has received 382 communications relating to article 15 of the Rome Statute in the period from 1 January 2012 through 30 September 2012, and a total of 9,717 since July 2002.
18. During the reporting period, the Office closed one preliminary examination in relation to Palestine and opened one preliminary examination in relation to Mali based on the referral of that situation by the Malian State.

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<sup>3</sup> For the sake of simplification, the Office has decided to retain four main phases. The article 15 communications that are deemed to warrant further analysis (formerly under phase ‘2a’) will be the subject of closer examination under phase 1 with a view to assessing whether the alleged crimes appear to fall under the jurisdiction of the Court. If such appears to be the case, the situation in question will advance to phase 2.

19. During the reporting period, the Office continued its preliminary examination activities in relation to the following situations:

- Assessing subject-matter jurisdiction (phase 2) in Afghanistan, Honduras, Korea and Nigeria;
- Assessing admissibility (phase 3) in Colombia, Georgia, Guinea and Mali.

## B. SUBJECT-MATTER JURISDICTION

### I. Afghanistan

#### *Procedural History*

20. The OTP has received 87 communications under article 15 of the Rome Statute related to the situation in Afghanistan between 1 June 2006 and 30 September 2012. The preliminary examination of the situation in Afghanistan was made public in 2007.

#### *Preliminary Jurisdictional Issues*

21. Afghanistan deposited its instrument of ratification to the Rome Statute on 10 February 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.

#### *Contextual Background*

22. After the attacks of 11 September 2001, in Washington D.C. and New York City, a United States-led coalition launched air strikes and ground operations in Afghanistan against the Taliban, suspected of harboring Al Qaeda. The Taliban were ousted from power by the end of the year, and under the auspices of the UN, an interim governing authority in Afghanistan was established in December 2001. In May-June 2002 a new transitional Government of Afghanistan regained sovereignty, but hostilities remained in certain areas of the country, mainly in the South. Subsequently, the UN Security Council in Resolution 1386 established an International Security Assistance Force (ISAF), which later came under NATO command. Today ISAF, the US forces and the Government of Afghanistan (GOA) forces combat armed groups, which include the Taliban, the Haqqani network and the Hezb-e-Islami Gulbuddin.
23. The Taliban, and the affiliated armed groups, have rebuilt their influence since 2003, particularly in the South and East. At least since May 2005, an armed conflict has intensified in the southern provinces of Afghanistan between organised armed groups, most notably the Taliban, and the Afghan and international military forces. The conflict has further spread to the north and west of Afghanistan, including the areas surrounding Kabul.

### *Alleged Crimes*

24. Killings: According to the United Nations Assistance Mission in Afghanistan (“UNAMA”), over 13,000 civilians have been killed in the conflict in Afghanistan in the period from January 2007 to June 2012.
25. According to UNAMA reports, in the period from January 2007 through June 2012, anti-government elements were responsible for at least 8,616 civilian deaths, while the pro-government forces were responsible for at least 3,055 civilian deaths. (Responsibility for some of the killings remains unknown.)
26. There are reports that the Taliban and other armed groups are allegedly also responsible for deliberately killing specific categories of civilians perceived to support the Government of Afghanistan and/or foreign entities present in Afghanistan. These categories of civilians, identified as such in the Taliban Code of Conduct (*Layha*) and in public statements issued by the Taliban leadership, include former police and military personnel, private security contractors, construction workers, interpreters, truck drivers, UN personnel, NGO employees, journalists, doctors, health workers, teachers, students, tribal and religious elders, as well as high profile individuals such as members of parliament, governors and mullahs, district governors, provincial council members, government employees at all levels, and individuals who joined the Afghanistan Peace and Reintegration Program and their relatives. These categories of civilians were attacked following three main modus operandi. First, and throughout the whole country, killings have allegedly been committed by beheading, hanging or shooting civilians. Second, the Taliban is alleged to have carried out suicide attacks targeted at civilians not taking direct part in hostilities. Third, suicide and non-suicide improvised explosive devices (IED) have allegedly been used for targeted assassinations of specific individuals such as high-profile government officials and provincial civilian officials.
27. There are reports that pro-government forces allegedly conducted military operations, including aerial attacks, force protection incidents, and night raid operations, which resulted in civilian deaths. The number of civilian deaths caused by pro-government forces has gradually decreased over time, reaching an all time low in the first half of 2012.
28. Torture and other forms of ill-treatment: Persons in the custody of the Afghan authorities and/or international military forces have allegedly been subject to possibly abusive interrogation techniques. In March 2012, the Afghanistan Independent Human Rights Commission documented instances of abuse in nine National Directorate of Security (NDS) facilities.
29. The Government of Afghanistan informed the Office that it has undertaken a comprehensive review and investigation of alleged incidents of mistreatment in Afghan prisons, and has taken steps to ensure the promotion and protection of human rights in NDS facilities, including by providing access to various national



and international bodies. The Office will continue to seek information on allegations of mistreatment of prisoners and steps taken to ensure accountability for those possibly involved.

30. Use of human shields: The Taliban allegedly used human shields during military operations by forcing villagers to host and feed the Taliban members, and using civilian houses as military bases and checkpoints.
31. Attacks on Protected Objects: Since May 2003, armed groups have allegedly launched numerous attacks on protected objects, including civilian government offices, hospitals, shrines and mosques, UN premises and MEDEVAC helicopters. There have also been persistent attacks on girls' schools by means of arson, armed attacks and bombs.
32. Abductions: The Taliban claimed responsibility for numerous abductions of civilians targeted on the basis of perceived association with the Government of Afghanistan and/or foreign entities present in Afghanistan, including civilian government officials, tribal elders, government workers, contractors, drivers, and translators. Many civilians abducted were later released following negotiations with elders, while some abducted civilians were killed. Abductions have been reported mainly in the south, southeast, east and central regions.
33. Imposition of punishments by parallel judicial structures: UNAMA reported on the establishment of parallel judicial structures by armed groups. These structures allegedly imposed severe punishments, such as executions and mutilations of persons perceived to collaborate with the Government of Afghanistan and/or foreign entities present in Afghanistan.
34. Recruitment of children: Both armed groups and Afghan government forces have allegedly conscripted, enlisted and used children to participate actively in hostilities. Armed groups also have allegedly used children to carry out suicide attacks, plant explosives and transport military equipment. The Office has been informed of progress made by the Government of Afghanistan in implementing the action plan for the prevention of underage recruitment into the Afghan National Security Forces concluded with the UN Special Representative of the Secretary-General for Children and Armed Conflict. The Office will seek to further verify whether any individual under the age of 15 remains enlisted in the ranks of the national army or police.

### ***Legal Assessment***

35. The Office is gathering and corroborating additional information to support an analysis as to whether there is a reasonable basis to believe that the following crimes have been committed by one or more parties to the conflict in Afghanistan: murder under article 8(2)(c)(i); cruel treatment and torture under article 8(2)(c)(i); committing outrages upon personal dignity, in particular

humiliating and degrading treatment under article 8(2)(c)(ii); intentionally directed attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directed attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directed attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities under article 8(2)(e)(vii); treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix) as well as murder constituting a crime against humanity under article 7(1)(a); and imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law constituting a crime against humanity under article 7(1)(e).

### *OTP Activities*

36. The Office has continued to seek and analyse information from multiple sources on alleged crimes committed by parties to the conflict. While a large number of alleged crimes have been and continue to be reported, verifying the seriousness of such allegations and obtaining the detailed information required to conduct a proper legal assessment of each reported incident and attribute responsibility continues to be a challenging and time-consuming process.
37. The preliminary examination of the situation in Afghanistan has been hampered by a number of constraints, including security concerns and limited or reluctant cooperation from many partners. Several requests for information sent by the Office in the past two years to various States, including the Government of Afghanistan and States with troops in Afghanistan, have been dismissed or remain pending. Ultimately, five States have replied to a formal request for information from OTP.
38. Furthermore, an important verification project on information on alleged crimes had to be postponed due to financial constraints experienced by the Office and the information provider. The Office also acknowledges the legitimate security and protection concerns that domestic or international governmental and non-governmental organisations present in Afghanistan may have in terms of submitting information to the OTP.

### *Conclusion and Next Steps*

39. The Office continues to maintain contact with experts, civil society organisations, Afghan Government officials, UN officials, and concerned States, and expects to reach a determination on subject-matter issues in the near future.

## II. Honduras

### *Procedural History*

40. On 18 November 2010, the Office announced the opening of a preliminary examination into the situation in Honduras in order to assess whether there is a reasonable basis to believe that alleged crimes committed in the aftermath of the *coup d'état* of 28 June 2009 could amount to crimes against humanity.
41. The OTP has received 17 communications under article 15 of the Rome Statute related to the situation in Honduras. Each of these communications has been analyzed in the course of the preliminary examination.

### *Preliminary Jurisdictional Issues*

42. Honduras ratified the Rome Statute on 1 July 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Honduras or committed by its nationals from 1 September 2002 onwards.

### *Contextual background*

43. On 28 June 2009, former President Zelaya was arrested by members of the armed forces for crimes against the model of governance, treason, usurpation of duties and abuse of authority and was flown to Costa Rica. The National Congress passed a resolution stripping President Zelaya of the presidency and appointing the then President of the Congress, Roberto Micheletti, as President of Honduras. On 30 June 2009, a State of Emergency was declared. Thousands of persons marched in demonstration of their opposition to the *coup d'état*.
44. Executive decrees restricting freedom of movement, assembly and expression were subsequently issued. The decrees permitted the armed forces to arrest persons found in public places after curfew hours and to search houses without warrants. They banned publications that could offend human dignity or government employees, or that could pose a threat to the law. The military was placed in reserve to support the national police in maintaining order and security. On 6 July 2009, a "Crisis Room" composed of Roberto Micheletti and top level military commanders was created to coordinate police and military operations. Zelaya attempted to return to Tegucigalpa but was prevented from doing so several times by the armed forces. Large demonstrations were held to demand his return, followed by massive arrests. On 21 September 2009, Zelaya finally returned to Honduras and found refuge in the Brazilian Embassy in Tegucigalpa.

45. Negotiations between the ousted government and the government of Micheletti initiated in July 2009 with the mediation of the OAS and the President of Costa Rica resulted in the “San Jose – Tegucigalpa Agreement.” The agreement provided for a unified government and the creation of a Truth and Reconciliation Commission. Further, it required both parties to recognize the result of the next presidential election.
46. On 27 January 2010, Porfirio Lobo was elected President, prompting Zelaya to go into exile. On 2 February 2010, an amnesty decree was adopted providing a pardon to all persons involved in the events of 28 June 2009, except for persons responsible for crimes against humanity and human rights violations. In April 2010, a Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*, hereinafter “TRC”) was established. The TRC published its report in July 2011.

### *Alleged Crimes*

47. *Imprisonment*: According to the TRC, approximately 2,000 to 5,000 persons were unlawfully arrested during the relevant period, usually for short durations (lasting from 45 minutes up to 24 hours long). Similarly, the Inter-American Commission on Human Rights (IACHR) and the UN Office of the High Commissioner for Human Rights (OHCHR) estimate the number of persons arrested at around 3,000. The Honduran authorities contend that the imprisonments may not qualify as a crime. Allegedly, acts of physical and verbal abuse were committed against detainees, and in some instances, acts of torture and ill treatment.
48. *Murder*: Some 20 to 56 persons were killed over the period, including activists allegedly deliberately targeted for opposing the *coup d’etat* and demonstrators killed as a result of excessive use of force by military and police personnel. Specifically, the TRC documented 20 cases of murder of civilians, of which eight were victims of deliberate murders. The IACHR reported that at least seven persons were killed due to excessive use of force.
49. *Torture*: The TRC documented three cases of persons affiliated with the opposition, including two journalists, who were arrested and subjected to acts of torture. It is estimated that four or five persons were tortured while in detention.
50. *Rape and Sexual Violence*: The TRC reported two cases of rape of by the police while the victims were in detention. Sexual violence has been alleged during detention and as a form of violence to deter demonstrations.
51. *Deportation*: According to the TRC, former President Manuel Zelaya and former Foreign Minister Patricia Rodas were arrested and deported to Costa Rica.

52. *Persecution*: There are allegations of threats and assaults against human rights activists, journalists and community leaders during the months following the *coup d'état*. On the basis of its investigation, the TRC concluded that these alleged acts would, if proven, constitute the crime of persecution as a crime against humanity under the Rome Statute, in the sense that the then authorities designed and implemented a policy to attack civilians on political grounds.

### *Legal Assessment*

53. The Office has analyzed whether the available information provides a reasonable basis to believe that the above-mentioned crimes were committed as part of a widespread or systematic attack directed against the civilian population in furtherance of a State or organizational policy, within the meaning of article 7 of the Rome Statute. At the current stage, the Office has identified arguments both supporting and opposing such a finding. Put differently, the situation in Honduras may be qualified as involving a “borderline” assessment.
54. *Attacks directed against the civilian population*: According to the information available, between 28 June 2009 and 27 January 2010, State forces allegedly attacked civilians who opposed the *coup d'état*, the government of Roberto Micheletti, and the deportation of Manuel Zelaya. The alleged sequence of illegal detentions and alleged instances of murder, torture and ill treatment, rape and sexual violence were allegedly committed in the context of the said attacks. It is also alleged that the police and the military used disproportionate and excessive force against peaceful demonstrators, including through the use of live ammunition, batons, metal bars and chains. According to the information available, civilians were allegedly physically assaulted during demonstrations, reportedly resulting in approximately 12 persons killed, hundreds injured and thousands illegally imprisoned.
55. The Office has also considered the extent to which the pattern of alleged crimes may fall short of the requirements of crimes against humanity. In particular, some of the information analyzed indicates that most of the violence attributed to the government occurred in response to public protests, suggesting the possible use of excessive force in response to public disorder rather than a State policy to attack the civilian population as such.
56. *Widespread or systematic nature of the attack*: The widespread character of the alleged attack against the civilian population appears to be supported by the large number of persons arrested and detained. From July - September 2009 at least 2,000 persons were allegedly detained. While in detention, demonstrators were allegedly subjected to ill treatment and beatings and, in some cases, to torture and sexual harassment.
57. The geographic scope of the incidents concerned also appears to substantiate a widespread occurrence of the alleged crimes. Crimes were allegedly committed

in different locations within Tegucigalpa, including the surroundings of the Congress, the Embassy of Brazil, Toncontin airport, 'Chochi' Sosa stadium and Suyapa boulevard. Several provinces were also affected, including San Pedro de Sula, Olancho, Comayagua, Lempira, Colon, Yoro, Choluteca, Copan and Cortes.

58. The Office also considered the relatively low number of alleged incidents of murder, torture, rape and sexual violence in the context of the situation. The TRC estimated a total of 12 murders attributable directly to the police or military action, with a further eight additional murders indirectly attributable to the State. Estimates of alleged rape victims range between one and seven persons.
59. *State or organizational policy*: According to the information available, Executive Decrees N. 011-2009 of 30 June 2009 and PCM-M-016 of 22 September 2009 served as the policy framework for the police and the military to commit abuses against civilians who opposed the *coup d'état*, including mass detentions, beatings, murders, torture and sexual abuse. The existence of a State policy may be further demonstrated by the restrictive measures taken against media stations and the setting up of a "Crisis Room" that reported directly to the President and was mandated to coordinate police and military operations.
60. The Office continues to consider the extent to which such derogations from the right to freedom of expression, movement and assembly and the establishment of a crisis cell to coordinate law enforcement operations may have been consistent with the adoption of emergency measures by the State in the face of widespread popular protests.

### *OTP Activities*

61. Over the reporting period, the Office sought additional information on the situation in Honduras from multiple sources, including the TRC, the Inter-American Commission on Human Rights, the Office of the High Commissioner for Human Rights as well as international and national NGOs.
62. The Office has taken cognizance of the report, published on 3 October 2012, by the alternative Truth Commission (*Comisión de Verdad*) established in May 2010 by Honduran human rights organizations.

### *Conclusion and Next Steps*

63. The Office will continue to evaluate, including on the basis of any additional information received, whether the alleged crimes committed in Honduras between June 2009 and January 2010 amount to crimes against humanity, so as to enable a final determination in due course.

### III. Republic of Korea

#### *Procedural History*

64. On 6 December 2010, the Office announced that it had opened a preliminary examination to assess whether there was a reasonable basis to believe that two incidents that occurred in 2010 in the Yellow Sea, namely the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's Yeonpyeong Island on 23 November 2010, could amount to war crimes.
65. In accordance with article 15, the Office sought additional information on the two incidents from multiple sources, including from the Government of the Republic of Korea ("ROK" or "South Korea") and the Government of the Democratic People's Republic of Korea ("DPRK" or "North Korea"). The Office has received seven communications under article 15 of the Rome Statute which were analyzed in the course of the preliminary examination. On 12 October 2012, the ROK Government responded to OTP's most recent request for information of 13 July 2011. The DPRK Government has yet to respond to or acknowledge the OTP's request for information of 25 April 2012.

#### *Preliminary Jurisdictional Issues*

66. The ROK is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over Rome Statute crimes occurring on the territory of ROK or by its nationals from 1 February 2003 onwards. Pursuant to article 12(2), the territorial jurisdiction of the Court includes alleged crimes occurring on board a vessel or aircraft registered in a State Party. The attack on Yeonpyeong Island was launched from the DPRK, and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a state party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the alleged perpetrators. The same applies to the nationals of any non-Party State involved in the alleged attack against the *Cheonan*.

#### *Contextual Background*

67. Since the armistice agreement was signed at the end of the Korean War (1953), both South and North Korea have acknowledged and respected the Northern Limit Line as a practical maritime demarcation in the Yellow Sea (West Sea) and reconfirmed its validity as the maritime demarcation in the Basic Agreement between South and North Korea in 1991 and its Protocol on Non Aggression in 1992. However, in 1999 North Korea proclaimed the so called

“Chosun Sea Military Declaration Line,” unilaterally modifying the previously agreed Northern Limit Line.

### *Alleged Crimes*

68. The shelling of Yeonpyeong Island occurred after military exercises by the ROK Marine Corps stationed on the island, including an artillery firing exercise. The exercises have been conducted annually since 1974. The shelling by the DPRK on 23 November 2010 came in two waves, the first between 14h33 and 14h46, and the second between 15h11 and 15h29. It resulted in the killing of four people (two civilians and two military personnel), the injuring of 66 people (50 civilians and 16 military personnel) and the destruction of military and civilian facilities on a large scale, estimated to cost \$4.3 million. In addition to the military base in the southwestern part of the island and other marine positions, quite a few civilian installations were hit, including the History Museum, locations close to Yeonpeyong Police Station and the Maritime Police Guard Post, the township office, a hotel, a health center and other civilian structures in the town of Saemaeul. As to the total number of artillery shells and rockets fired by the DPRK, the report of the UN Command<sup>4</sup> states that a total of 170 rounds were fired, of which 90 landed in the water surrounding Yeonpeyong Island. The ROK Government indicated that 230 rounds were fired. The DPRK publicly acknowledged responsibility for the shelling.
  
69. In contrast, the DPRK denied responsibility for the sinking of the *Cheonan*, a Patrol Combat Corvette of the ROK Navy’s Second Fleet. At 21h22 on 26 March 2010, the *Cheonan* was hit by an explosion, broke in half and sank, resulting in the deaths of 46 ROK Navy sailors. A Joint Investigation Group led by the ROK with participation by the US, UK, Australia, Canada and Sweden concluded that an underwater explosion from a torpedo manufactured by North Korea caused the sinking. Furthermore, the Multinational Combined Intelligence Task Force (MCITF), composed of South Korea, the US, Australia, Canada and the UK found that the torpedo was launched from a North Korean submarine. The U.N. Command Military Armistice Commission also established a Special Investigation Team that reached the same conclusion and found that the evidence was “so overwhelming as to meet the ... standard of beyond reasonable doubt.”<sup>5</sup>

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<sup>4</sup> Special investigation into the Korean People’s Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010, U.N. Doc. S/2010/648, 19 December 2010.

<sup>5</sup> Letter dated 23 July 2010 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398, p.7.



### *Legal Assessment*

70. The Office is analyzing the contextual elements under article 8 and the underlying acts, in order to determine whether the information available provides a reasonable basis to believe that war crimes were committed in the course of either incident. In addition, the Office is analyzing whether either incident was committed as part of a plan or policy, in accordance with article 8(1).
71. The *Cheonan* was a naval vessel and all those on board who drowned in the sinking were military personnel. In general, it is not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship. However, and subject to the contextual elements being met, the Office is examining whether the information available provides a reasonable basis to believe that the war crime of killing or wounding treacherously was committed (article 8(2)(b)(xi)).
72. The shells fired onto Yeonpyeong hit both military and civilian objects. The targeting of the military base, the killing of two ROK Marines and the wounding of a number of ROK Marines would not constitute war crimes, as such objects and persons are legitimate military targets. However, with respect to the civilian impact, and subject to the contextual elements being met, the Office is examining whether there was intentional targeting of civilian persons and objects (articles 8(2)(b)(i) or (ii)), or excessive incidental death, injury or damage to civilian persons and objects (article 8(2)(b)(iv)).

### *OTP Activities*

73. The Office has continued to seek additional information from relevant sources, focusing its activities on ascertaining factual issues that are key to determine, in accordance with article 53(1), whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed in the course of either incident. The Office is ensuring a fair process by giving all those concerned the opportunity to present their arguments.

### *Conclusion and Next Steps*

74. Considering the information provided by the ROK and the lack of information from North Korea, the Office will continue assessing whether there is a reasonable basis to believe that the alleged attacks constitute crimes within the jurisdiction of the Court following which it will make its final determination.

#### IV. Nigeria

##### *Procedural History*

75. In the period from 10 November 2005 to 30 September 2012, the Office has received 59 article 15 communications in relation to the situation in Nigeria, out of which 26 were manifestly outside the jurisdiction of the Court; five were found to warrant further analysis; and 28 communications were included in the preliminary examination. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

##### *Preliminary Jurisdictional Issues*

76. Nigeria deposited its instrument of ratification to the Rome Statute on 27 September 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.

##### *Contextual Background*

77. Nigeria's approximately 168 million inhabitants belong to over 250 ethnic groups. Owing to the particular federal character of the country, there are distinctions drawn between "indigenes" of a state (individuals considered to be living in their state of "origin") and those referred to as "non-indigenes" or "settlers" ("newcomers" who might have lived in the state for decades), a conceptual difference made in the constitution of Nigeria.

78. Central and northern parts of Nigeria have been affected by inter-communal, political and sectarian violence at least since the return to democratic rule in 1999, with varying intensity over time and location. The main causes of the violence include ethnic and/or religious divisions in the states as well as a struggle for political power, and disputes over issuing certificates on indigeneity and access to resources.

79. According to the information available, Boko Haram, a Salafi-jihadi Muslim group that operates mainly in northeastern Nigeria, has allegedly attacked religious clerics, Christians, political leaders, Muslims opposing the group, members of the police and security forces, "westerners", journalists, as well as UN personnel. The group has also been accused of committing several large-scale bombing attacks against civilian objects, including deliberate attacks against Christian churches and primary schools. In June 2011, President Jonathan sent a Joint Task Force comprised of military, police, immigration and intelligence personnel to address the security threat posed by Boko Haram.

80. The oil-rich Niger Delta region has also experienced violence among ethnically-based gangs and militia as well as between such groups and the federal security forces. The violence primarily relates to a struggle for control over oil production and access to resources in the region. Among the most active armed groups is the Movement for the Emancipation of the Niger Delta (MEND), which has in the past allegedly engaged in the kidnapping of both foreign and Nigerian oil workers as well as in the attacks against oil infrastructure. The region has been repeatedly affected by political violence during electoral cycles.

### *Alleged Crimes*

81. *Killings*: According to the information available, between July 2002 and April 2011, thousands of people allegedly died in Nigeria as a consequence of inter-communal, sectarian and political violence. These reported deaths are unevenly distributed over time and place, with the vast majority occurring in central and northern Nigeria, specifically in the States of Plateau, Kaduna and Kano, in a series of major assaults along ethnic/sectarian lines by mobs or youth groups. The Office has no information, at this stage, suggesting that specific leaders or organizations are responsible. A further large number of killings occurred in Northern Nigeria in connection with the post-election violence of 2011.
82. Boko Haram members are alleged to have killed numerous Christian worshippers, police officers, and soldiers, as well as local politicians, community leaders, and Islamic clerics who oppose the group. The Nigerian Chief of Army Staff stated that Boko Haram is responsible for killing 3,000 persons since the start of its violent campaign. Human Rights Watch estimates that since 2009 more than 1,200 Christian and Muslim civilians have been killed in hundreds of alleged attacks by Boko Haram in 12 northern and central Nigerian states, as well as in Abuja. On 26 August 2011, Boko Haram attacked the United Nations Headquarters in Abuja with a vehicle-borne suicide bomb, resulting in the deaths of 26 persons. There are also allegations that the response of Nigerian security forces against suspected Boko Haram members has involved the excessive use of force as well as summary executions of civilians.
83. Civilians have also been killed in the southern Delta region as a consequence of political and other forms of armed violence, including armed confrontations between government forces and Delta-based militant groups in 2009. In addition, MEND claimed responsibility for an attack outside the Niger Delta region; on 1 October 2010, Nigeria's Independence Day, two bombs exploded at Eagle Square near the Minister of Justice in Abuja, killing at least 12 persons and injuring more than 20 persons.
84. *Rape and Sexual Violence*: Rape and other forms of sexual violence have allegedly been committed in the context of ethnic/sectarian violence and in the context of operations by the security forces and during detention, in the northern, central

and Delta regions. However, information remains scarce and no precise numbers are available.

85. *Abductions (Delta)*: Abductions by militant groups appear to have been concentrated in the Delta region, particularly in Rivers State, where kidnappings allegedly became commonplace since the beginning of 2006 and targeted foreign oil workers.
86. *Torture*: An unknown number of detainees arrested in connection with the inter-communal violence as well as in connection with Boko Haram have allegedly been tortured by security forces in detention facilities across Nigeria. According to the UN Special Rapporteur on Torture, torture has been used in detention facilities for the purpose of extracting confessions or to obtain further information in relation to alleged crimes.

### *Legal Assessment*

87. Based on the available information, there does not now appear to be a reasonable basis to believe that the alleged crimes committed in Central and Northern States in connection with the inter-communal violence could constitute crimes against humanity. This initial assessment may be revisited by the Office in the light of new facts or evidence that could enable the identification of specific leaders or organizations allegedly responsible for instigating such violence or the existence of an organizational policy.
88. Based on the available information, there also does not now appear to be a reasonable basis to believe that the alleged crimes committed in the Delta Region could constitute war crimes. In particular, the violence in the Niger Delta, including the armed confrontations between MEND militants and the Nigerian Joint Task Force in 2009, does not appear to involve protracted armed violence between governmental authorities and organized armed groups or between such groups, as stipulated in article 8(2)(f). This initial assessment may be revisited in light of new facts or evidence.
89. The Office considers that there is a reasonable basis to believe that since July 2009, Boko Haram has committed the following acts constituting crimes against humanity: (i) murder under article 7(1)(a) and (ii) persecution under article 7(1)(h) of the Statute. In particular, the information available provides a reasonable basis to believe that since July 2009 Boko Haram has launched a widespread and systematic attack that has resulted in the killing of more than 1,200 Christian and Muslims civilians in different locations throughout Nigeria, including Borno, Yobe, Katsina, Kaduna, Bauchi, Gombe and Kano States in the North as well as Abuja, Kaduna and Plateau States in Central Nigeria. The consistent pattern of such incidents indicates that the group possesses the means to carry out a widespread and/or systematic attack, and displays internal coordination and organizational control required to that end. The attacks have

been committed pursuant to the policy defined at the leadership level of Boko Haram, which aims at imposing an exclusive Islamic system of government in northern Nigeria at the expense of Christians specifically. Opponents to this goal have been targeted as well. Boko Haram leaders or spokesmen have issued public statements evincing the intention to attack civilians in furtherance of this policy, including a January 2012 ultimatum urging Christians to leave Northern Nigeria. The targeting of an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other ground is a constitutive element of the crime of persecution under article 7(1).

90. Although allegations against Nigerian security forces in the context of their operations against Boko Haram may reflect serious human rights violations, the information available at this stage does not permit a finding of a reasonable basis to believe that such acts were committed pursuant to or in furtherance of a State or organizational policy to attack the civilian population. There is also currently no reasonable basis to believe that the confrontations between the security forces and Boko Haram amount to an armed conflict. Again, these initial assessments may be revisited in the light of new facts or evidence.

#### *OTP Activities*

91. During the reporting period, the OTP has maintained and developed contacts with senders of article 15 communications, academics and researchers specialized on Nigeria, and Nigerian NGOs as well as international human rights NGOs.
92. Since the public announcement of the preliminary examination in November 2010, the Nigerian authorities have continued to be forthcoming in providing additional requested information to the OTP.
93. Upon an invitation of the Attorney-General of the Federation and Minister of Justice, the OTP conducted a mission to Abuja, Nigeria in July 2012, led by the Prosecutor. The purpose of the mission was to provide an update on the preliminary examination of the situation in Nigeria and gather information from multiple sources on alleged crimes committed in the Middle-Belt States and in Northern Nigeria, including attacks attributed to Boko Haram. The Nigerian authorities granted full assistance in organizing the visit and provided extensive material to the OTP in the context of the preliminary examination, including information on national proceedings at the state and federal levels.
94. During the mission, the Prosecutor and the OTP team had extensive consultations with President Goodluck Jonathan; the Attorney-General of the Federation and Minister of Justice Mohammed Bello Adoke; various representatives of Kaduna and Plateau States, including the Attorney-Generals of the Plateau and Kaduna States, the Inspector General of Police; the Police Commissioners of Kaduna and Plateau States; the chairpersons of various panels

of investigations on the inter-communal, sectarian and political violence in Nigeria; European Union Ambassadors to Nigeria; and international and local NGOs. The discussions revolved around the nature of the alleged crimes committed and steps taken by the Nigerian authorities at the federal and state levels to bring the perpetrators to account.

95. On 15 August 2012, the OTP asked the Nigerian Government for copies of reports of the various investigative commissions undertaken to date as well as other information offered during the mission. The OTP has received part of the requested material.

### *Conclusion and next steps*

96. The Office has determined that there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria, namely acts of murder and persecution attributed to Boko Haram. Therefore, the Prosecutor has decided that the preliminary examination of the situation in Nigeria should advance to phase 3 (admissibility) with a view to assessing whether the national authorities are conducting genuine proceedings in relation to those who appear to bear the greatest responsibility for such crimes, and the gravity of such crimes.

## C. ADMISSIBILITY

### I. Colombia

#### *Procedural History*

97. The Situation in Colombia has been under preliminary examination since June 2004. The OTP has received 114 communications under article 15 in relation to the situation in Colombia. Of these, 20 were manifestly outside the Court's jurisdiction and 94 are analysed in the context of the preliminary examination. On 2 March 2005, the Prosecutor informed the Government of Colombia that he had received information on alleged crimes committed in Colombia that could fall within the jurisdiction of the Court. Since then, the Prosecutor has requested and received additional information on (i) crimes within the jurisdiction of the Court and (ii) the status of national proceedings.

#### *Preliminary Jurisdictional Issues*

98. The Court may exercise its jurisdiction over ICC crimes committed in the territory or by the nationals of Colombia since 1 November 2002, following Colombia's ratification of the Statute on 5 August 2002. However, the Court only has jurisdiction over war crimes since 1 November 2009, in accordance with Colombia's declaration pursuant to article 124 of the Rome Statute.

#### *Contextual Background*

99. The Republic of Colombia has experienced almost 50 years of violent conflict between government forces and rebel armed groups, as well as between such armed groups. The most significant actors include the so-called guerrilla armed groups the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* ("FARC") and the *Ejército de Liberación Nacional* ("ELN"); paramilitary armed groups, sometimes referred to collectively as the *Autodefensas Unidas de Colombia* ("AUC"); and the national armed forces and the police.
100. Over the years, the Government of Colombia has held several peace talks and negotiations with various armed groups, with differing degrees of success. The Justice and Peace Law ("JPL") adopted in 2005 was designed to encourage paramilitaries to demobilize and confess their crimes in exchange for reduced sentences. Recent years have seen the power of the paramilitaries diminish, including through demobilization. Some demobilized fighters, however, have allegedly reconfigured into smaller and more autonomous units.

### *Subject-Matter Jurisdiction*

101. The Office has received and gathered information on a large number of alleged crimes within the jurisdiction of the Court.
102. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified in the future, the Office determined that there is a reasonable basis to believe that from 1 November 2002 to date, at a minimum the following acts constituting crimes against humanity have been committed by non-State actors, namely the FARC, ELN and paramilitary groups: murder under article 7(1)(a) of the Statute; forcible transfer of population under article 7(1)(d) of the Statute; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e) of the Statute; torture under article 7(1)(f) of the Statute; rape and other forms of sexual violence under article 7(1)(g) of the Statute. The required elements appear to be met for each group taken individually.
103. There is also a reasonable basis to believe that from 1 November 2009 to date, at a minimum the following acts constituting war crimes have been committed by the FARC and the ELN: murder pursuant to article 8(2)(c)(i) and attacking civilians pursuant to article 8(2)(e)(i); torture and cruel treatment pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii); taking of hostages pursuant to article 8(2)(c)(iii); rape and other forms of sexual violence pursuant to article 8(2)(e)(vi); conscripting, enlisting and using children to participate actively in hostilities pursuant to article 8(2)(e)(vii).
104. Because paramilitary armed groups demobilized as of 2006, they are not considered a party to the armed conflict during the period over which the ICC has jurisdiction over war crimes. Nonetheless, the Office continues to analyse whether so called 'successor paramilitary groups' or 'new illegal armed groups' could qualify as organised armed groups that are parties to the armed conflict or would satisfy the requirements of organisational policy for the purpose of crimes against humanity. The Government of Colombia refers to these groups as criminal bands (*bandas criminales* or BACRIM), and does not consider them as organized armed groups that are parties to the armed conflict.
105. State actors, in particular members of the Colombian army, have also allegedly deliberately killed thousands of civilians to bolster success rates in the context of the internal armed conflict and to obtain monetary profit from the State's funds. Executed civilians were reported as guerrillas killed in combat after alterations of the crime scene. Allegedly, these killings, also known as '*falsos positivos*' (false positives), started during the 1980s and occurred with greatest frequency from 2004 until 2008. The available information indicates that these



killings were carried out by members of the armed forces, at times operating jointly with paramilitaries and civilians, as a part of an attack directed against civilians in different parts of Colombia. Killings were in some cases preceded by arbitrary detentions, torture and other forms of ill-treatment.

106. There is a reasonable basis to believe that the acts described above were committed pursuant to a policy adopted at least at the level of certain brigades within the armed forces, constituting the existence of a State or organizational policy to commit such crimes. As Chambers of the Court have found, “a State policy does not need to have been conceived at the highest level of State machinery but may have been adopted by regional or local organs of the State. Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.”<sup>6</sup> The Office continues to analyse information on whether such a policy may have extended to higher levels within the State apparatus. Accordingly, on the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified in future, the Office determined that there is a reasonable basis to believe that, since 1 November 2002, at a minimum the following acts constituting crimes against humanity have been committed by organs of the State: murder under article 7(1)(a) of the Statute; enforced disappearance under article 7(1)(i) of the Statute. The Office continues to analyse whether there is a reasonable basis to believe that torture was committed in ‘false positive’ cases in a systematic or widespread manner and as part of an organizational policy.
107. The available information further provides a reasonable basis to believe that in the period from 1 November 2009 to date, members of State forces have committed at a minimum the following acts constituting war crimes: murder pursuant to article 8(2)(c)(i) and attacking civilians pursuant to article 8(2)(e)(i); torture and cruel treatment pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii); rape and other forms of sexual violence pursuant to article 8(2)(e)(vi).

### *Admissibility Assessment*

108. The Colombian authorities have been and are currently conducting a large number of proceedings against members of different groups identified above for conduct which constitutes a crime within the jurisdiction of the Court. Proceedings have been initiated and convictions have been issued against leaders of the FARC and ELN guerrilla armed groups, senior paramilitary

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<sup>6</sup> “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para 89; “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d’Ivoire,” Situation in the Republic of Cote d’Ivoire, 3 October 2011, ICC-02/11-14-Corr, p. 20, para. 45. See also ICTY, “Prosecutor v. Blaki, Judgement,” 3 March 2000, IT-95-14-T, p. 69, para. 205.

leaders, army officials, and politicians with alleged links to armed groups. The proceedings concerned have been conducted under the ordinary criminal justice system as well as under Law 975 of 2005, popularly known as the Justice and Peace Law (*Ley de Justicia y Paz*) – a transitional justice mechanism designed to encourage paramilitaries to demobilize and confess their crimes in exchange for reduced sentences. Accordingly, the focus of the Office’s preliminary examination and interaction with the Colombian authorities has been to ascertain whether proceedings have been prioritized against those who appear to bear the greatest responsibility for the most serious crimes within the jurisdiction of the Court and whether such proceedings are genuine.

109. The information available indicates that the national authorities have conducted relevant proceedings against those who appear to bear the greatest responsibility for the most serious crimes from among members of the FARC and ELN. According to the information available, a large number of FARC and ELN members, including senior leaders, have been the subject of national proceedings under the ordinary criminal justice system in Colombia. Thus far, 218 FARC and 28 ELN members have been convicted of conduct that constitutes a crime within the jurisdiction of the Court, including killing, forcible displacement, hostage-taking, torture and child recruitment. A number of senior leaders, including the first and second in command of the FARC and the ELN, were also convicted *in absentia*. The information available indicates that eight current or former members of the FARC Secretariat, its highest leadership body, and four current members of ELN’s Central Command, have been convicted *in absentia*. Subject to the appropriate execution of sentences of those convicted *in absentia*, the Office has no reason at this stage to doubt the genuineness of such proceedings.
110. Many demobilized members of paramilitary groups have also been the subject of JPL proceedings, including a significant number of senior leaders. At the time of writing, 12 individuals have been convicted and sentenced under the JPL framework, of whom seven were leaders or commanders of paramilitary units. In addition to proceedings under the JPL system, 23 paramilitary leaders have been convicted under the ordinary justice system. Available information indicates that out of 57 leaders or commanders of paramilitary armed groups, 46 are still alive, of whom 30 have been convicted in respect of conduct which constitutes a crime within the jurisdiction of the ICC, including murders, forced displacement, enforced disappearances, abductions and child recruitment. At least 15 of the 30 convictions are for crimes that also fall under the ICC’s temporal jurisdiction, i.e., since 1 November 2002. Of the 30 paramilitary leaders convicted, 26 were convicted for murder, 11 for forcible displacement, six for abductions, three for child recruitment, and two for rape. Another 13 paramilitary leaders or commanders are the subject of ongoing proceedings (eight under JPL and five under the ordinary system).
111. Although the progress made in investigations under the JPL framework has been slower than might have been expected in a confession-based process, the

Office does not at this stage consider the delays in reaching a conclusion to criminal proceedings necessarily indicate a lack of willingness or ability. The Office recognizes the complexity of the endeavour in the particular circumstances of demobilization. Acknowledging that the determination of how to prioritize cases is not straightforward, the Office welcomes the issuance of Directive 0001 of 2012 by the Colombian Attorney General. The Office continues to assess whether cases have been prioritised against individuals who contributed to the emergence, consolidation and expansion of paramilitary groups, taking into account the above-mentioned directive.

112. In this regard, the Office also notes the efforts of JPL Chambers and the Supreme Court in uncovering and investigating agreements between paramilitaries and certain members of the national congress and other public officials – a phenomenon also known as *parapolitics*. For instance, by August 2012 over 50 former congressmen had been convicted by the Supreme Court for promoting illegal armed groups pursuant to an agreement with an illegal armed group.<sup>7</sup> In a few cases, the Colombian Supreme Court has found that some former public officials were also responsible for violent crimes or has ordered further investigations. The nature of these agreements continues to be assessed by the Office in the context of principal and accessory liability for alleged crimes committed by paramilitary armed groups.
113. In relation to allegations against State security forces, the Office notes that numerous members of the armed forces have been subjected to disciplinary measures and criminal proceedings, including convictions and prison sentences, and that prosecutions and trials are ongoing. The OTP will continue to examine whether these proceedings ultimately focus on the alleged responsibility of those at senior levels for the occurrence of such crimes, either as perpetrators or in respect of their liability as commanders.
114. Information submitted by the Colombian authorities indicates that 207 members of the armed forces have been convicted for murder of civilians within ICC temporal jurisdiction, with sentences ranging from nine to 51 years of imprisonment. In addition, the Office has information about 28 convictions for abetting and concealment of murder of civilians, with sentences ranging from two to six years of imprisonment. The Office of the Attorney General's Human Rights Unit is investigating 1,669 cases of false positives, or extrajudicial killings of civilians committed by military forces and presented as deaths in combat, in which the number of victims could reach 2,896.
115. With respect to commissioned officers of the armed forces, the Office has gathered information on 52 convictions rendered in regard to alleged false positives incidents with sentences between 24 months and 51 years of

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<sup>7</sup> The main criminal offence charged is *concierto para delinquir*, defined in article 340 of the Colombian Penal Code.

imprisonment. The convictions are against one colonel, three lieutenant colonels, eight majors, 16 captains and 24 lieutenants.

116. There have also been a limited number of proceedings concerning rape and other forms of sexual violence committed in the context of the armed conflict, despite the scale of the phenomenon. The available information indicates that to date only four individuals (including two paramilitary leaders) have been convicted for rape or other forms of sexual violence. Both the Colombian Constitutional Court and United Nations Human Rights Committee have noted the inadequacy of prosecutorial and judicial activity in relation to these crimes. The same holds true for the crime of forced displacement in spite of efforts by the Office of the Attorney General to follow-up on injunctions by the Constitutional Court.
117. On 19 June 2012, the Colombian Senate approved the Legal Framework for Peace (*Marco Legal para la Paz*), a bill establishing a transitional justice strategy that includes the prioritization and selection of cases against those bearing the greatest responsibility for crimes against humanity and war crimes. The bill also enabled the conditioned dropping of all other non-selected cases and the suspension of selected sentences. The Office notes the recent publication of Directive 0001 of 2012 of the Colombian Attorney General on prioritization of cases. The Office continues to follow closely the implementation of these measures.

### *Conclusion and Next Steps*

118. The Office will pursue its exchange of communications with the Government of Colombia in regard to the issues identified above and will follow closely the issuance of bills attendant to the Legal Framework for Peace and their implementation. Likewise, the Office will also seek additional information on the reform of the legislative framework pertaining to the jurisdiction of military courts.
119. From this point onward, the preliminary examination of the Situation in Colombia will focus on (i) follow-up on the Legal Framework for Peace and other relevant legislative developments, including jurisdictional aspects relating to the emergence of 'new illegal armed groups;' (ii) proceedings relating to the promotion and expansion of paramilitary groups; (iii) proceedings relating to forced displacement; (iv) proceedings relating to sexual crimes; and, (v) false positive cases.

## II. Georgia

### *Procedural History*

120. The OTP has received 3,854 communications in relation to the situation in Georgia. The preliminary examination of the situation in Georgia was announced on 14 August 2008.

### *Preliminary Jurisdictional Issues*

121. Georgia deposited its instrument of ratification to the Rome Statute on 5 September 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Georgia or by its nationals from 1 December 2003 onwards.

### *Contextual Background*

122. The armed conflict that occurred in Georgia in August 2008 has its roots in the dismantling of the Soviet Union. A first conflict over South Ossetia, Georgia's northern autonomous entity, took place between 1990 and 1992. The conflict ended with the peace agreement signed on 24 June 1992 in Sochi, by Russian and Georgian Presidents Boris Yeltsin and Eduard Shevardnadze, providing for the deployment of a joint peacekeeping force. South Ossetia also became a semi-autonomous area with two separate administrations.
123. Following years of peace, skirmishes between South Ossetian forces and the Georgian army degenerated, on 7 August 2008, into an armed conflict, which was rendered international by Russia's involvement. A cease-fire agreement between Georgia and the Russian Federation, mediated by the then French President Nicolas Sarkozy, was reached on 12 August 2008, although alleged crimes continued to be committed thereafter.

### *Alleged Crimes*

124. Forcible displacement of Georgian population: South Ossetian armed forces allegedly forced up to 30,000 ethnic Georgians to flee from villages within and outside South Ossetia by systematically destroying and pillaging their houses and other property. In some cases, ethnic Georgians were killed and/or subjected to abuses.
125. Attack against peacekeepers: The Georgian armed forces carried out alleged attacks on Russian Peacekeeping Forces' positions in Tskhinvali during the

night from 7 to 8 August 2008. According to the Russian authorities, 10 peacekeepers belonging to the Russian peacekeeping battalion were killed and 30 were wounded as a result of the alleged attack.

126. Unlawful attacks directed against the civilian population and civilian objects: Both Georgian and Russian armed forces allegedly launched indiscriminate and disproportionate attacks against civilian targets and/or failed to take the required precautions to minimize civilian losses.
127. Destruction of property: Extensive destruction of civilian property allegedly resulted from heavy shelling and bombing of towns and villages during the active hostilities phase. At a later stage, destruction of property also resulted from acts of violence carried out by South Ossetian forces in ethnic Georgian villages in South Ossetia and to a lesser extent in the “buffer zone”.
128. Pillage: In the aftermath of the active hostilities, ethnic Georgian villages in South Ossetia and the “buffer zone” were allegedly systematically pillaged by South Ossetian armed forces. Acts of destruction and pillage were allegedly committed in presence of Russian forces.
129. Torture and other forms of ill-treatment: Georgian prisoners of war, as well as ethnic Georgian and South Ossetian civilians, were allegedly victims of torture and other forms of ill-treatment.

#### ***Subject-Matter Jurisdiction***

130. There is a reasonable basis to believe that parties to the armed conflict have committed the following crimes within the jurisdiction of the Court: (i) torture under article 8(2)(a)(ii) and/or article 8(2)(c)(i); (ii) destruction of property under article 8(2)(a)(iv) and/or article 8(2)(e)(xii); (iii) pillaging under article 8(2)(b)(xvi) and/or article 8(2)(e)(v); (iv) deportation or forcible transfer of population under article 7(1)(d).
131. Further evaluation of other alleged conduct by parties to the conflict, including the alleged intentional directing of attacks against Russian peacekeepers, has to date proved inconclusive. This initial assessment may be revisited in the light of new facts or evidence.

#### ***Admissibility Assessment***

132. The Investigative Committee of the Russian Federation and the Chief Prosecutor of Georgia have been conducting separate investigations into incidents that could constitute crimes under the jurisdiction of the ICC. The Office has regularly consulted with the competent national authorities in order

to assess whether they are genuinely willing and able to bring to justice those who appear to bear the greatest responsibility for the most serious crimes.

133. On 18 October 2011, the Russian Embassy in The Hague informed the Office that the Russian authorities were genuinely unable to conduct further proceedings owing to the lack of cooperation of the Georgian government and the immunity enjoyed by senior foreign officials who might be subject to prosecutions. On 18 June 2012, however, the Russian authorities specified that the “refusal of Georgia to provide legal assistance and immunity of senior officials of foreign States, do not – in accordance with the rules of criminal procedure of the Russian Federation – constitute grounds for termination of the said criminal case. Thus, the national proceedings with respect to this criminal case are carried on.” The Office was further informed that the Investigative Committee of the Russian Federation was examining more than 80 applications of various human rights organizations, representing the interests of more than 600 nationals of Georgia who allegedly suffered from the Russian servicemen’s actions during the 2008 armed conflict.
134. In its 12 December 2011 updated report concerning the national criminal proceedings related to the August 2008 armed conflict, the Georgian government confirmed to the OTP that it was “mindful of its international obligation to investigate and prosecute grave crimes that concern the international community as a whole and resorts to its best efforts to comply with those commitments.” The Government further announced its intention to submit additional information and material to the OTP within a few months, specifically focusing on the “ethnic cleansing case.” As of now, this submission has yet to be received.
135. At this stage, both Georgia and Russia appear to be conducting relevant national investigations into the crimes allegedly committed during the armed conflict. Four years after the events, however, neither investigation has yielded any results. Pursuant to article 17(2) and (3) of the Rome Statute, this raises the questions whether (a) the proceedings were or are being undertaken for the purpose of shielding the person(s) concerned from criminal responsibility; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person(s) concerned to justice; (c) the proceedings are not conducted independently or impartially, and in a manner which in the circumstances is inconsistent with an intent to bring the person(s) concerned to justice; and (d) due to a total or substantial collapse or unavailability of their national judicial system, the respective States are unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
136. According to the General Prosecutor’s Office of Georgia, the two main obstacles to the investigation of the acts allegedly committed by the Georgian military are the lack of access to the alleged crime scene and the lack of cooperation from Russia and South Ossetia. The Russian authorities also highlighted two

main obstacles in their investigation, namely the lack of cooperation by the Georgian government and the immunity, under international law, of senior foreign officials from the criminal jurisdiction of the Russian Federation.

### *OTP Activities*

137. During the reporting period, the Office continued to follow up on investigations into alleged crimes committed during the armed conflict and to engage with relevant stakeholders at the regional and national level.
138. As part of the Researcher-in-Residence Programme of the Organization for Security and Co-operation in Europe (OSCE), the Office conducted a visit to the OSCE Office in Prague, Czech Republic, in March 2012. The aim of the mission was to inspect a selection of pre-defined OSCE documents on site, that could help assess the information already received by the Office in relation to the situation in Georgia. Consultations on further access to and transmission of the relevant information identified are ongoing.
139. The Office also maintains close contacts with NGOs present in the region, some of which are also assessing relevant national proceedings. On 24 April 2012, a network of international and Georgian NGOs submitted an open letter to the Prosecutor stating that “although corresponding authorities from both Georgia and Russia state that national investigations into the crimes committed during the war are ongoing, neither side has publicly shown any progress or significant effort for these to be deemed genuine investigations. For more than three years, no information whatsoever has been available to the victims, their legal representatives, the general public or other interested parties about any national investigations being undertaken.” The network recommends that should its preliminary examination confirm that national investigations are not being undertaken in a genuine manner, the Prosecutor should open an investigation into the crimes allegedly committed during the 2008 conflict.

### *Conclusion and Next Steps*

140. The Office is seeking clarification as to whether the respective national investigations have halted; whether any additional information remains to be provided to the Office; and whether the lack of cooperation identified as an obstacle both by the Russian and Georgian authorities may be overcome through enhanced mutual legal assistance between the two States.



### III. Guinea

#### *Procedural History*

141. The OTP has received 19 communications under article 15, of which eight were received between October and November 2009. The preliminary examination of the situation in Guinea was announced on 14 October 2009.

#### *Preliminary Jurisdictional Issues*

142. Guinea deposited its instrument of ratification to the Rome Statute on 14 July 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Guinea or by its nationals from 1 October 2003 onwards.

#### *Contextual Background*

143. In December 2008, after the death of President Lansana Conte, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. Dadis Camara became the Head of State, established a military junta, the *Conseil National pour la Démocratie et le Développement* ("CNDD"), and promised that the CNDD would transfer power after holding presidential and parliamentary elections. However, subsequent statements suggesting that Dadis Camara might run for president led to protests by opposition and civil society groups. On 28 September 2009, the Independence Day of Guinea, an opposition gathering at the national stadium in Conakry was violently suppressed by the security forces, leading to what became known as the "28 September massacre".

#### *Alleged Crimes*

144. The United Nations established an International Commission of Inquiry which issued its final report on 13 January 2010. The Commission confirmed that at least 156 persons were killed or disappeared, and at least 109 women were victims of rape and other forms of sexual violence. Cases of torture or cruel, inhumane or degrading treatment were also confirmed. The Commission considered that there is a strong presumption that crimes against humanity were committed.
145. The *Commission Nationale d'Enquête Indépendante* ("CNEI"), set up by the Guinean authorities, confirmed that killings, rapes and enforced disappearances took place, although in slightly lower numbers than documented by the UN Commission.

146. Killings and Disappearances: Over 150 persons were allegedly killed by State security forces and militia loyal to former President Moussa Dadis Camara in the national stadium in Conakry on 28 September. A number of persons also disappeared after their arrests inside or outside the stadium. Others were allegedly abducted at hospitals and never seen again.
147. Rape and Sexual Violence: On 28 September 2009, over 100 women and young girls were allegedly raped or suffered from other forms of sexual violence including mutilations. Most of these acts allegedly took place in the stadium. Several women were also allegedly abducted, detained and used as sexual slaves for a period of several days.
148. Arbitrary Detention and Torture: On 28 September 2009 and in its immediate aftermath, scores of civilians were allegedly arrested and detained. While in detention, they allegedly suffered from regular beatings and other acts amounting to torture.
149. Persecution: On 28 September 2009 and in its immediate aftermath, pro-governmental security forces allegedly attacked civilians based on their perceived ethnic affiliation and/or their support for opposition candidates.

#### ***Subject-Matter Jurisdiction***

150. The 28 September 2009 events in the Conakry stadium can be characterised as a widespread and systematic attack against the civilian population in furtherance of the CNDD's policy to prevent opponents from, and punish them for, challenging Dadis' intention to keep his group and himself in power.<sup>8</sup>
151. On the basis of available information, the Office has determined that there is a reasonable basis to believe that crimes against humanity were committed in Conakry on 28 September 2009 and the following days, including murder under article 7(1)(a), imprisonment or other severe deprivation of liberty under article 7(1)(e), torture under article 7(1)(f), rape and other form of sexual violence under article 7(1)(g), persecution under article 7(1)(h), and enforced disappearance of persons under article 7(1)(i).

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<sup>8</sup> As Chambers of the Court have found, "an attack in a small geographical area, but directed against a large number of civilians" may meet the requirement of a widespread attack. Situation in the Democratic Republic of the Congo, *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", para.395; Situation in the Central African Republic, *the Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", para.83.

### *Admissibility Assessment*

152. Following the OTP's announcement of the opening of a preliminary examination on 14 October 2009, the Guinean Foreign Minister visited the Office and indicated that the Guinean authorities were willing and able to proceed with a criminal investigation, which was formally opened on 8 February 2010. The Guinean Chief Prosecutor then appointed a panel of three judges to investigate the 28 September 2009 case on the basis of the report from the Guinean independent commission of inquiry and the UN International Commission of Inquiry.
153. The judges' investigation is still ongoing. According to the information available, the national authorities appear to be investigating the same persons and the same conduct that would form the basis of the potential case that the Office would seek to bring before the ICC. Accordingly, the Office has focussed its admissibility assessment on whether the national authorities are unwilling or unable to genuinely carry out the proceedings. At this stage, the Office considers that the potential case that it would seek to bring concerning the events of 28 September 2009 would be inadmissible before the ICC for the reasons listed below.
154. The investigation has resulted in the indictment of six individuals, including two persons listed by the UN International Commission of Inquiry among the alleged most responsible perpetrators: Lt. Col. Moussa Tiegboro Camara, head of the national agency for the fight against drug-trafficking, organized crime and terrorism (with the rank of minister) was charged on 1 February 2012 for murders, injuries and participation in a crime; Col. Abdoulaye Cherif Diaby, former Health Minister at the time of the events was indicted on 13 September 2012.
155. The investigation has been carried out at a fairly slow, yet steady pace. Assessing unjustified delay requires measuring the investigative steps taken against a certain timeline, and taking into account whether any possible delay may be justifiable in light of specific circumstances. There appears to be numerous challenges facing the panel of judges, such as the availability of financial and logistical resources, security concerns and a sometimes tense political climate. Against these odds, the investigation has nonetheless been pursued and notable progress has been achieved, in particular during the reporting period.
156. Although the investigation into the 28 September 2009 events focuses on a highly sensitive case which must be carried out in a challenging environment, the Office has no reason to doubt the integrity of the panel of judges in charge.
157. Finally, while fulfilling their duty in rudimentary conditions, the judges have managed to interview more than 200 victims and collected additional evidence on the basis of which six persons could be indicted, five of whom appeared

before the judges (the sixth indictee, Aboubakar Diakite "Toumba", former aide de camp of Moussa Dadis Camara, is subject to an international warrant of arrest).

158. In this context, the Office considers that the facts do not support a finding of admissibility at this stage. This assessment remains ongoing and may be revisited on the basis of new facts, in particular should a genuine national prosecution not materialise.

#### *OTP Activities*

159. Since the 28 September 2009 events, the OTP has paid six successive visits to Conakry to follow up on the investigation conducted by the Guinean authorities.
160. During the reporting period, the then Deputy Prosecutor and Prosecutor-elect Fatou Bensouda paid her third visit to Guinea in April 2012, and held meetings with victims and victims' associations, with the panel of judges in charge of the investigation as well the Justice Minister, Christian Sow, and the Guinea President and Head of State, Prof. Alpha Condé. In the course of her visit, Deputy Prosecutor Bensouda encouraged the victims to keep trust and patience, the judges to pursue their efforts, and the Guinean government to provide them with unconditional support. The Guinean authorities committed to facilitate the work of the panel of judges without reservation and in full respect for their independence, and indicated that they hoped that a trial would be held before the end of 2012.
161. In July 2012, in a letter to President Condé, Prosecutor Bensouda nonetheless expressed her concerns at the apparent lack of progress of the national investigation and the reported failure of the authorities to provide material support to the panel. Thereafter, the Office was informed that new financial and logistical means were subsequently granted to the judges, who resumed interviews of victims and witnesses and ultimately gathered evidence leading to the indictment of the former Health Minister Col. Diaby.
162. In the meantime, the Office has been maintaining close contact with international NGOs monitoring or assisting the victims in the proceeding such as FIDH. The Office has also liaised with UN bodies such as the Peace-Building Commission and the Office of the UN Special Representative on Sexual Violence in Conflict in order to mobilize and facilitate international support for the Guinean investigation.

### *Conclusion and Next Steps*

163. Over the reporting period, the Guinean investigation into the alleged crimes committed on 28 September 2009 in Conakry has generated significant results. This investigation has yet to be completed. In accordance with its positive approach to complementarity, the Office will continue to actively follow-up on the proceedings and to mobilize relevant stakeholders, including State Parties and international organizations, to support the efforts of the Guinean authorities to ensure that justice is rendered. Should such efforts fail, the Office may revise its current finding of inadmissibility. The situation will therefore remain under preliminary examination.

## IV. Mali

### *Procedural History*

164. The Office has received 32 article 15 communications in relation to the situation in Mali.
165. On 18 July 2012, the Malian Government referred “the situation in Mali since January 2012” to the ICC.

### *Preliminary Jurisdictional Issues*

166. The Court has jurisdiction over crimes against humanity, war crimes and genocide committed on the territory of Mali or by its nationals as of 1 July 2002. On 18 July 2012, the Malian authorities referred the situation in Mali to the ICC with respect to alleged crimes committed “since the month of January 2012,” with no end-date. The OTP is therefore not limited to investigate alleged crimes committed between January 2012 and the receipt of the referral on 19 July but may investigate crimes committed after that date if they occur in the context of the situation in Mali.
167. The Court has jurisdiction *ratione loci* under article 12(2)(a). The Malian government referred “the situation in Mali” to the Court with no limitations on the scope of territorial jurisdiction of the Court. The OTP is therefore not limited to investigate alleged crimes committed in the three northern regions (where the vast majority of the alleged crimes occurred), but may investigate crimes committed on the entire territory of Mali, if warranted, should they occur in the context of the same situation.

### *Contextual Background*

168. Since 17 January 2012, there is an ongoing non-international armed conflict in the territory of Mali between the government forces and different organized

armed groups, particularly Mouvement National de Libération de l'Azawad (MNLA), Al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and Mouvement pour l'Unité et le Jihad en Afrique de l'Ouest (MUJAO) and 'Arab militias,' as well as between these armed groups without the involvement of government forces.

169. The armed conflict in Mali can be divided into two phases. The first phase started 17 January 2012 with the eruption of a Tuareg rebellion and MNLA's first attack on the Malian forces' military base in Menaka (Gao region). This phase ended on 1 April 2012 when the Malian armed forces withdrew from the north. The second phase, which is still ongoing, took place immediately after the aforementioned withdrawal when armed groups seized control of the North. This phase of the conflict is mainly characterized by armed clashes between different armed groups fighting to gain exclusive control over the territory and sporadic attempts by the government to fight the armed groups and retake control over areas in the north. By the end of June 2012 the MNLA was expelled from the main northern cities; Timbuktu, Kidal and Gao fell under the control of Ansar Dine and/or MUJAO. The presence of members from the Nigerian militant group "Boko Haram" has also been reported.<sup>9</sup>
170. The handling of the crisis in the North by the Malian Government was subject to strong criticism within the armed forces. Whereas presidential elections were scheduled for 29 April 2012, a group of Malian soldiers overthrew outgoing President Touré on 22 March 2012, announced the suspension of the constitution and the dissolution of all democratic institutions and established the National Committee for the Restoration of Democracy and State (*Comité national pour le redressement de la démocratie et la restauration de l'Etat* - CNRDR). The coup, led by Captain Amadou Haya Sanogo, effectively left the army paralysed which in turn made it possible for the rebels to seize control of all northern regions of Mali by early April 2012.

### *Alleged Crimes*

171. *Killings*: Up to 153 captured members of the Malian armed forces were allegedly summarily executed by armed groups following the attack on the military camp in Aguelhok. The attack appears to have been conducted by MNLA with the assistance of other armed groups but the circumstances of and responsibilities for the alleged execution remain unclear.
172. It is alleged that in the context of the attempt to impose Sharia law on the population in the North by armed groups controlling this territory since April 2012, civilians have been stoned to death or executed.

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<sup>9</sup> See section on "Nigeria" in the present report.

173. On 9 September 2012, 16 unarmed Muslim preachers were allegedly shot dead by the Malian army at an army checkpoint while they were on their way to Bamako.
174. *Torture and other forms of ill-treatment*: Following the seizure of northern cities, the armed groups, including Ansar Dine, MUJAO and AQIM allegedly imposed on the local population their interpretation of Sharia law, including physical punishments such as amputation, flogging and beating.
175. *Attacks against religious and historical monuments*: In the period from 4 May 2012 through 10 July 2012, a series of attacks in the city of Timbuktu against at least nine mausoleums, two mosques and two historical monuments with designated World Cultural Heritage status have been directed by members of Ansar Dine and possibly by members of AQIM and MUJAO.
176. *Pillaging*: According to Malian sources and international NGOs the takeover of the large cities in the north of Mali, including Gao and Timbuktu, by MNLA and Ansar Dine at the end of March/beginning of April 2012 gave rise to the systematic looting and destruction of banks, shops, food reserves, public buildings, hospitals, schools and Christian places of worship, offices of international organizations, residences of high-level civil servants, members of the Malian security services, and certain economic personalities.
177. *Rape*: Between 50 and 100 incidents of rape have been reported following the seizure of the northern cities by armed groups, especially in Gao and Timbuktu.
178. *Child recruitment*: According to UN sources, international NGOs and media reports, armed groups who control northern Mali recruited several hundred children aged between nine and 17 and may have set up training camps around Gao and Timbuktu. It also alleged that government-affiliated militias include children within their ranks.

#### *Subject-Matter Jurisdiction*

179. Following an analysis of information received, the Office determined that there is a reasonable basis to believe that the following acts constituting war crimes have been committed since January 2012: violence to life and person, in particular murder under article 8(2)(c)(i); intentionally directing attacks against protected objects, including religious buildings and historic monuments under article 8(2)(e)(iv); pillaging under article 8(2)(e)(v); and rape under article 8(2)(e)(vi).
180. The Office also received credible information regarding the alleged recruitment of children by armed groups under article 8(2)(e)(vii). The Office continues to gather additional information on the number of children allegedly under 15

years of age, the circumstances of their recruitment and the specific groups alleged to have been involved, in order to satisfy the reasonable basis to believe standard.

181. Subject to further analysis, there is currently no reasonable basis to believe that crimes against humanity under article 7 have been committed in the situation of Mali. This assessment remains ongoing and may be revisited on the basis of new facts or information.

### ***Admissibility Assessment***

182. Complementarity: When referring the situation in Mali to the Court on 18 July 2012, the Malian authorities informed the Office that following the withdrawal of the judicial services from the northern cities after their take-over by armed groups, the Malian courts are unable to prosecute crimes allegedly committed since January 2012 in the regions Kidal, Gao and Timbuktu. Consequently, the cases that could arise from an investigation into the situation by the Office would appear to be *prima facie* admissible before the ICC.
183. Should the Prosecutor decide to open an investigation in Mali, the Office may revisit this assessment following any information received by States pursuant to the article 18 notification procedure.
184. Gravity: On the basis of information available, the Office has identified potential cases that appear to meet the gravity threshold set out in article 17(1)(d), based upon an assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation. The Office has also assessed, in accordance with the considerations referred to in article 8(1), the extent to which such alleged war crimes may have been committed as part of a plan or policy or on a large scale.

### ***OTP Activities***

185. The situation in Mali has triggered the attention of the Office since violence erupted in northern Mali in January 2012.
186. On 24 April 2012, the Office issued a public statement recalling that Mali is a State Party to the Rome Statute, and that the Court has jurisdiction over possible war crimes, crimes against humanity or genocide that may be committed on the territory of Mali or by Malian nationals as of 1 July 2002.
187. On 20 June 2012, the Office received a delegation from the Malian National Assembly led by the 2<sup>nd</sup> Vice-President of the National Assembly.



188. On 1 July 2012, the Office issued another public statement indicating that the directing of attacks against and the deliberate damaging of shrines of Muslim saints in the city of Timbuktu may constitute war crimes under the Rome Statute. The Prosecutor warned that those who destroy religious buildings in Timbuktu should know that they will be held accountable.
189. Similarly, on 5 July 2012, the Security Council adopted resolution 2056 based on Chapter 7 of the UN Charter, in which it stressed that attacks against buildings dedicated to religion or historic monuments can constitute violations of international law which may fall under Additional Protocol II to the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court.
190. On 7 July 2012, during a summit held in Ouagadougou, Burkina Faso, the ECOWAS Contact Group on Mali called for an ICC investigation into war crimes committed by rebels in the North of Mali, referring specifically to the destruction of historical monuments in Timbuktu. Throughout the period, the Office maintained high-level contacts with most ECOWAS member states, including Burkina Faso, Côte d'Ivoire, Nigeria, and Senegal.
191. On 18 July 2012, a Delegation of the Malian Government led by the Minister of Justice, Malick COULIBALY, met with the Prosecutor and referred "the situation in Mali since January 2012" to the ICC and provided supporting documentation.
192. On 28-31 August 2012, the Office conducted a visit to Bamako, Mali. The purposes of the visit were to further evaluate information and sources on alleged crimes in accordance with article 15, and further enhance cooperation with Malian stakeholders, including civil society organizations and other partners. The Malian Government provided full assistance to the OTP.
193. On 9-12 October 2012, the Office conducted a second visit to Bamako, Mali and Ouagadougou, Burkina Faso. The purpose of the visit was to follow-up on meetings with Government and ECOWAS officials in Bamako and meet with President Compaoré of Burkina Faso in Ouagadougou to discuss the situation in Mali.
194. The Office keeps in contact with representatives of the Malian government, international community, regional organizations, as well as international and local NGOs.

### *Conclusion and Next Steps*

195. The Office continues to analyze information on alleged crimes committed in Mali on an on-going basis. Taking into account the interests of justice, the Prosecutor will announce her decision on whether to open an investigation in Mali within the near future.

## D. COMPLETED PRELIMINARY EXAMINATIONS

### I. Palestine

196. On 3 April 2012, the Office issued a decision to close the preliminary examination of the situation in Palestine. The preliminary examination had been initiated following the lodging, on 22 January 2009, by Ali Khashan acting as Minister of Justice of the Government of Palestine of a declaration pursuant to article 12(3) of the Rome Statute accepting the exercise of jurisdiction by the International Criminal Court for “acts committed on the territory of Palestine since 1 July 2002.”
197. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute were met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).
198. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a “State” (article 12) provide jurisdiction. Article 12 establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court’s jurisdiction (article 12(3)).
199. The Office undertook a number of steps to evaluate whether the declaration lodged by Palestine met the requirements of article 12(3) of the Statute, that is, whether Palestine qualifies as a “State” for the purposes of article 12(3) of the Statute. The Office provided Palestine, as well as other interested parties, with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports and received submissions on the issue from a variety of experts, academics and NGOs.
200. In accordance with article 125, the Rome Statute is open to accession by “all States,” and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State,” it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a “State.” Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of the General Assembly. The

Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.

201. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1).
202. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of "observer," not as a "Non-member State." The Prosecutor has therefore determined that there was no basis on which to pursue the preliminary examination further. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.
203. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12, or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

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